JOHORE REPORT.

[APPELLATE CIVIL JURISDICTION]

LAVILLE, J.

March 4, 1940.

YAKMAN BIN MOHAMED TAHIR & ANOTHER

(Petitioners)

v.

THE PUBLIC PROSECUTOR OF JOHORE

(Respondent).

[JOHORE BAHRU ORIGINATING PETITION No. 3 of 1939]

Criminal Law—Order for payment by convicted person of compensation to person injured—Imprisonment in default of payment ultra vires—F.M.S. Criminal Procedure Code, Ss. 175, 426, 432, 438.

Although payment of a sum awarded to an accused person under Section 175 of the F.M.S. Criminal Procedure Code as compensation for a frivolous or vexatious complaint or under Section 438 as compensation for groundless arrest, can be enforced by simple imprisonment, yet where compensation is ordered under Section 426 to be paid by the person convicted to a person injured by the offence and default in payment is made, imprisonment of neither description can be ordered notwithstanding that the compensation awarded is in the nature of a fine or punishment.

Law in the Colony distinguished.

Cases referred to:—

(1) *Abdullah bin Tembon v. Public Prosecutor,* 7 F.M.S.L.R. 31.

(2) *Eusoff Hajee Ahmad v. Municipal Commissioners of Singapore,* (1931) S.S.L.R. 61.

(3) *Pallak Nath Singh v. Rex,* 2 M.L.J. 94.

(4) *Rex v. Haji Meydin,* 2 M.L.J. 71.

REVISION OF MAGISTRATE'S ORDER.

The petitioners had applied to the Supreme Court for the review of certain proceedings in which they had been convicted of an offence under the Small Offences Enactment. Their petition was dismissed except in regard to an Order made by the Magistrate that they should suffer imprisonment in default of payment of compensation awarded to the complainant. The portion of the Judgment set out hereunder relates to the legality of this Order.

Mitra for petitioners.

Ismail, Deputy Public Prosecutor for Respondent.

Laville, J.—The question also arises in these two cases as to whether the Magistrate's order of imprisonment in default of payment of compensation is correct.

Section 426 of the Criminal Procedure Code gives power to order compensation or costs in addition to any other punishment and applies the provisions of Section 432 to any order made thereunder, with the exception of para (d) of sub-section (i) of Section 432.

Section 432 (i) states that when a person is under this Code, for any reason whatsoever, ordered to pay any sum of money by way of costs or compensation, the Court making the order may in its discretion do all or any of the following things namely

(a) allow time for payment

(b) direct payment by instalments

(c) issue warrant for distress and sale in order to levy the amount

(d) direct that in default of payment or sufficient distress such person shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may be sentenced....provided where time is is not allowed for payment an order for imprisonment in default shall not issue unless such person has none or insufficient property or that the levy of distress will be more injurious to him or his family than imprisonment.

(e) direct payment out of money found on him etc.

The section allows imprisonment to be of either description and there are other provisions which it is not necessary for the purposes of this judgment to enumerate.

Section 438 allows a Magistrate in case of groundlessly giving in charge to award compensation up to $25/- and any expenses incurred. Sub-section (ii) provides that any imprisonment imposed under Section 432 in default of payment of compensation under this section i.e., under Section 438 shall be simple.

Section 175 of the Code provides for an order for compensation to an accused who is acquitted when the charge is frivolous or vexatious, and also lays it down that any imprisonment imposed under Section 432 for default of payment of compensation ordered under Section 175 shall be simple.

It would appear therefore that Sections 175 and 438 contemplate compensation to the accused in case of acquittal or unreasonable arrest, and Section 426 covers all compensation paid in cases of conviction to the complainant.

From the words "in addition to any other punishment" in Section 426 it appears clear that an order for costs or compensation made in a criminal matter is looked upon as an additional penalty or punishment, when it is made in favour of the complainant against the guilty party, and the appropriate method of enforcing it would be by imprisonment in default of either description.

As to orders under Sections 175 and 438, they appear to be more of a civil than a criminal nature: this appears from the direction in Section 175 (iii) that in any civil action relating to the frivolous or vexatious charge the civil Court shall take into account in making its award any sum already awarded and recovered or paid in a criminal Court under Section 175, Criminal Procedure Code.

Section 438 (iii) also contemplates that compensation awarded under Section 438 shall be no bar to an action for false imprisonment and in awarding damages the Court would no doubt take into account the amount awarded in the criminal Court if any under this section.

Under Section 432 (i) (d) the Court ordering compensation or costs can make an immediate order for imprisonment in default only if it is satisfied that the person against whom the order is made

(1) has no property or not enough to satisfy the order for compensation or costs, or

(2) if an order for distress would injure him or his family more than imprisonment.

Otherwise it must make an order under paras (a) or (b) or (c) or (e) of sub-section (i) and defer the order for imprisonment in default, till there has been disobedience to any order under the said paragraphs.

It is therefore possible under the provisions of Sections 175 and 438 combined with the provisions of Section 432 (i) for a Court in certain circumstances to make an immediate order for imprisonment in default of payment of compensation ordered under Sections 175 and 438 but only in the circumstances laid down by para. (d) of sub-section (i) of Section 432.

But under the provisions of Sections 426 (ii) it would appear that the provisions of Section 432 (i) (d) do not apply to an order for compensation made under Section 426, though the remaining provisions of Section 432 do apply. The result is that no order for imprisonment in default of payment of compensation ordered under Section 426 can be made under Section 432 at all, and there appear to be no other provisions under which an order for imprisonment can be made in such case.

Under the Colony law the situation is different. Sections 175, 426, 432 and 438 of the Johore Code have their exact counterparts in Sections 180, 432, 433 and 438 respectively, but Section 180 and Section 438 make no provision that imprisonment in default shall be simple as the Johore Code does, and Section 432 does not contain the words "except para (iv) of sub-section (i) of Section 433" which would be the equivalent of the words contained in Section 432 of the Johore Code "except para (d) of sub-section (i) of Section 432." As a result it is open to a Court in the Colony to impose immediate imprisonment in default of payment of compensation in the circumstances laid down under sub-section 433 (i) (iv) (432 (i) (d) of the Johore Code) not only in cases falling under Sections 180 and 438 (Johore Code Sections 175 and 438) but also in cases falling under Section 433.

To sum up, under the Colony Code an immediate order for imprisonment or default can be made in given circumstances in all cases of compensation under the Criminal Procedure Code. Under the Johore Code under similar given circumstances such order can be made only in cases of compensation for frivolous and vexatious proceedings or groundlessly giving in charge. No such order in any circumstances whatever can be made where compensation is ordered to be paid by a guilty party to a successful complainant. Neither in the Colony nor Johore can a Court in *all* circumstances make an immediate order for imprisonment on default of paying compensation.

The question as to whether payment of compensation ordered in a criminal matter could be enforced or recovered by an order for imprisonment in default has been judicially considered in several cases.

In 1924 the Singapore Court of Appeal decided in *Eusoff Hajee Ahmad v. The Municipal Commissioners of Singapore*[2] that imprisonment was not a method of recovering a fine inflicted under the Municipal Ordinance.

In 1927 Thorne J. on an appeal in Perak Magistrate's case *Abdullah bin Tembon v. The P.P.*[1] followed the above cited ruling and held that an order for 3 months R.I. in default of payment of $200/- compensation was *ultra vires* and that the only method of recovering compensation awarded under the Criminal Procedure Code was by distress: in effect he held that imprisonment was not a method of enforcing or recovering a fine.

In *Pallak Nath Singh v. Rex*[3] in January, 1933 the full Court of Appeal in Singapore held that imprisonment in default of a fine was a method of enforcing or recovering it, and that compensation awarded under the Criminal Procedure Code was a punishment and in the nature of a fine and therefore would be so recovered or enforced. The Court doubted the finding of Thorne J. in *Abdullah bin Tembon v. The P.P.*[1] cited above.

In *Rex v. Haji Mydin*[4] in 1933 the Court of Appeal held that an order for costs made under Section 432 Criminal Procedure Code was enforceable as a fine and that imprisonment in default could be ordered.

All these cases however it is to be remembered were decided on the provisions of the S.S. Criminal Code Section 432 as it then was and the corresponding provision in the F.M.S. Code.

Sub-section (2) of that section read:—

> The Court shall specify the person to whom any sum by way of costs or compensation as aforesaid is to be paid and payment thereof may be enforced in the same manner as if the amount thereof was a fine....

Under Section 273 Crminal Prosedure Code, S.S. a fine could be enforced by imprisonment in default: similar provision was made in the F.M.S. Code, which is the Johore Code.

In 1933 however subsequent to the findings in the cases cited the provisions of Section 432 were altered both in the Colony and the F.M.S. and the direction that compensation could be enforced as though it were a fine was omitted, and for that direction was substituted in the Colony the words 'and the provisions of Section 433 shall be applicable to any order made under this section.'

In the F.M.S. the words were 'and the provisions of Section 432 (S.S. 433) except para (d) of sub-section (i) thereof, shall be applicable to any order made under this section.'

It would appear therefore that the rulings in the above cited cases no longer apply, and that though the compensation is in the nature of a fine or punishment, it is not recoverable now as such, but only under the special provisions laid down under Section 433 Colony Code and 432 of the Johore or F.M.S. Code.

The effect of these provisions has been stated above and in view of the non-applicability of Section 432 (i) (d) to orders for compensation made under Section 426 I hold that an order for imprisonment in default of payment of compensation ordered under that section, is *ultra vires* and cannot stand.

I therefore set aside the order of the Magistrate in both these cases so far as it relates to imprisonment in default of the payment of $15/- compensation.

Order accordingly.